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STATE OF WISCONSIN

IN SUPREME COURT

AUGUST TERM, 1939.

No. 97

F. W. WOOLWORTH CO., a foreign corporation,

Appellant,

vs.

WISCONSIN TAX COMMISSION,

Respondent.

CASE

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This is an appeal from a judgment rendered in the Circuit Court for Dane County, Wisconsin, the Honorable August C. Hoppmann presiding, on the 10th day of June, 1939, which said judgment confirmed an order of the Wisconsin Tax Commission dated December 19th, 1938 which levied an assessment upon the appellant under the so-called Wisconsin Privilege Dividend Tax law and denied a claim of the appellant for refund of a portion of the tax paid. The decision of the Wisconsin Tax Commission denied the claim for refund by the appellant in the sum of $2515.61 and further levied an additional tax of $20,282.68.

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137-157 NOTICE OF APPEAL TO THE CIRCUIT COURT FOR DANE COUNTY FROM DECISION AND ORDER OF THE WISCONSIN TAX COMMISSION.

(Title omitted.)

137 *To The Wisconsin Tax Commission, Madison, Wisconsin:*

PLEASE TAKE NOTICE that the *F. W. WOOLWORTH. CO.* hereby appeals to the Circuit Court for Dane County, Wisconsin, from the whole of the order and decision of the Wisconsin Tax Commission which was served by registered mail upon appellant on December 27, 1938, and which bears date the 19th day of December, 1938, a copy of which said order and decision is hereto attached, marked Exhibit I, and is hereby referred to and made a part of this notice.

OBJECTIONS TO ORDER AND DECISION AND TO ASSESSMENT AND DENIAL OF REFUND.

The objections to said order and decision and to the assessment made and to the denial of refund on such portion of alleged tax as was paid, are stated as follows:

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138 (1) The assessment and the order denying refund are void and of no effect whatsoever by reason of the fact that the purported law on which the said assessment and purported tax is based is unconstitutional under both the Constitution of the United States of America and the Constitution of the State of Wisconsin, and particularly under the Fourteenth Amendment of the Constitution of the United States of America; Article I, Section 1, Constitution of the State of Wisconsin Article I, Section 8, Constitution of the United States of America; Article I, Section 10, Constitution of the United States of America; Article I, Section 8, Constitution of the State of Wisconsin; Article I, Section 12, Constitution of the State of Wisconsin; Article IV, Section 1, Constitution of the United States of America.

(2) That said assessment, insofar as it includes any so-called dividends on treasury stock, as part of the base upon which the alleged privilege dividend tax is computed, is void and of no effect whatsoever by reason of the fact that the law does not contemplate that dividends on treasury stock should be included in such base.

STATEMENT OF FACTS UPON WHICH APPELLANT RELIES AS CONSTITUTING BASIS OF THIS APPEAL.

From the record herein made before the Wisconsin Tax Commission it appears that the F.

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W. Woolworth Co. is a New York corporation engaged in the business of operating a retail merchant business in twenty - nine states of the United States and also in the District of Columbia and Cuba. The company also owns all or part of the stock of corporations engaged in a similar business in the other nineteen states of the United States and also in Canada, Great Britain and
139 Germany. The statutory principal office of the company at which meetings of the stockholders are held is at Woolworth Building, Watertown, New York, and the principal business office at which meetings of directors are held is at Woolworth Building, New York, New York. The said F. W. Woolworth Co. is qualified to do business in the State of Wisconsin, but has no executive office of any kind located within the State of Wisconsin.

Under the formula used by the Tax Commission the total adjusted net income for the year 1934 was $27,808,579.19, for the year 1935 $24,606,991.08, and for the year 1936 $25,102,593.64. While the Taxpayer does not concede that these figures so used by the Wisconsin Tax Commission are accurate, no question is raised with respect thereto on this appeal.

The amount of such net income allocable to Wisconsin under the formula used by the Wisconsin Tax Commission for the year 1934 was $555,538.44, for the year 1935 $579,547.66, and for the year 1936 $576,522.38. The percentage of total net income allocable to Wisconsin on the basis of the formulae so used by the Wisconsin

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Tax Commission was 1.9977% for the year 1934, 2.3552% for the year 1935 and 2.2966% for the year 1936.

On each December 2, 1935, March 2, 1936, July 1, 1936, September 1, 1936, December 1, 1936 and March 1, 1937, the F. W. Woolworth Co. declared a dividend upon all of its outstanding shares of stock and paid a total on each of said dates of $5,882,167.80 in dividends exclusive of so-called dividends on shares held in the treasury, and made payment of so-called dividends on treasury stock of $27,832.20 on each of said dates. Under date of January 24, 1936 the F. W. Woolworth Co. paid to the Wisconsin Tax Commission the sum of $2515.61, under a return made to the Wisconsin Tax Commission of the dividend paid by the company on December 2, 1935. This payment was specifically made under protest, as appears
140 from the protest marked Exhibit 2 which it attached to the return and is part of the record before the Tax Commission.

By notice of additional assessment dated July 16, 1937, the Wisconsin Tax Commission assessed an additional privilege dividend tax in the principal amount of $17,959.19 together with interest and penalties, with respect to the dividend hereinbefore referred to. This assessment was made pursuant to Chapter 505 of the Wisconsin Laws of 1935 effective September 26, 1935, as amended by Chapter 552 of the Laws of 1935 effective October 9, 1935, Chapter 233 of the Laws of 1937 effective June 15, 1937, and Chapter 309 of the

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Laws of 1937 effective July 1, 1937. As stated before, the Wisconsin Tax Commission determined that the percentage of the 1934 income allocable to Wisconsin was 1.9977%, that the percentage of 1935 income allocable to Wisconsin was 2.3552%, and that the percentage of 1936 income allocable to Wisconsin was 2.2966%. After multiplying dividends (exclusive of those on treasury stock) paid on December 2, 1935 by .019977, and dividends (exclusive of those on treasury stock) paid in the calendar year of 1936 by .023552, and the dividends paid on March 1, 1937 (exclusive of those on treasury stock) by .022966, the resulting figures were multiplied by the rate of tax fixed by the Wisconsin Tax Commission (.025641), deduction was made on account of the payment made under protest hereinbefore referred to, penalties and interest were added, and the final figure was the amount of the assessment so determined. Under the decision of the Wisconsin Tax Commission of December 19, 1938, the rate of tax fixed by the Wisconsin Tax Commission was reduced from .025641 to .025 but all so-called dividends on treasury stock were added to the dividends upon which computation had theretofore been made, and it was ordered that the privilege dividend tax be recomputed to include
141 the so-called dividends on treasury stock of the company. In all other respects the original additional assessment was affirmed. The final additional tax on the dividends in question as ordered by the Wisconsin Tax Commission, together with penalties to February 1, 1939, is reflected by com-

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putations made by accountants of the Wisconsin Tax Commission and is attached hereto and marked Exhibit II.

Application for refund of the tax paid in the amount of $2515.61 on January 29, 1936, was disallowed by the Wisconsin Tax Commission, and the F. W. Woolworth Co. duly filed its application for hearing on the denial of this refund.

F. W. Woolworth Co. also duly filed its original application and amended application for hearing and objection to the additional assessment within the period allowed by law.

Hearing was had on both the application for hearing from the order denying the refund, and on the amended application for hearing and objection to the additional assessment, resulting in the entry by the Wisconsin Tax Commission of the order from which this appeal is taken.

There follows a recitation of certain of the details with respect to the F. W. Woolworth Co.'s manner of conducting its operations and disbursing its funds. On each of the dates fixed as a record date for the determination of stockholders entitled to receive each of the dividends upon which a privilege dividend tax has been assessed against the company there has been in excess of 50,000 stockholders of the company residing in all parts of the world, owning an aggregate of 9,703,-613 shares (exclusive of treasury stock). On each of the said dates the number of such stockholders residing in the State of Wisconsin has been not greater than 470 and the number of shares held by such stockholders has been not greater than

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14,597. The exact number of shares held by all stockholders and stockholders resident in Wisconsin on each of said dates, is shown herein as follows:

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Dividend Date	Total Shares (except treasury)	No. of Wis. Shareholders	Total shares held by Wis. residents
12/2/35	9,703,613	457	14,597
3/2/36	9,703,613	437	13,101
6/1/36	9,703,613	437	12,837
9/1/36	9,703,613	464	12,945
12/1/36	9,703,613	470	12,967
3/1/37	9,703,613	468	13,388

All meetings of the board of directors of the company at which dividends were declared were held in the State of New York; all acts of the company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York, and the funds out of which such dividends were paid were kept in the State of New York. No act or transaction connected with the declaration and payment of such dividends was done within the State of Wisconsin, with the sole exception that certain dividends so declared and paid amounting in the case of each of the dividends to which this appeal relates to less than one-sixth of 1% of all the dividends declared and paid were received by stockholders of the company residing within the State of Wisconsin. The percentage received by residents of Wisconsin on each of the dividend paying dates is shown herein as follows:

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Dividend Date	Total dividends paid (except on treasury shares)	Dividends paid to Wisconsin residents	Per cent of div. paid to Wisconsin residents
12/2/35	$ 5,822,167.80	$ 8,757.20	.1504%
3/2/36	5,822,167.80	7,914.60	.1359%
6/1/36	5,822,167.80	7,696.20	.1321%
9/1/36	5,822,167.80	7,767.00	.1334%
12/1/36	5,822,167.80	7,780.20	.1336%
3/1/37	5,822,167.80	8,032.80	.1379%

143 Dividends were paid by the mailing of a check from the City of New York, New York, to the respective stockholders of record as of the date fixed by the board of directors.

All of the gross income of the company's stores in Wisconsin, after payment of certain expenses, was during the period of time involved on this appeal sent to a district office in the City of Minneapolis, Minnesota, where such income was mingled with funds received from stores in other states. After the payment by the district office of certain other expenses, all surplus funds were transferred by that office to the principal office of the company in New York and deposited in a New York bank to the credit of the appellant. Out of the sums so deposited are paid general corporation expenses, salaries, taxes, dividends, and many other items. All stock records are kept and all dividends are disbursed by City Bank Farmers Trust Company of New York City, which acts as transfer agent and paying agent of the company. Dividends are not paid out of in-

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come received from any particular source or earned in any ascertainable period, but are paid out of the general funds of the company. Regardless of when earned or from where earned, the dividend payment is made by drawing a check or checks for the total amount to the order of the City Bank Farmers Trust Company, which itself makes the actual payments to the stockholders, mailing the same in the regular course of the mails from New York to the respective addresses of the stockholders at the dates fixed by the board of directors. The F. W. Woolworth Co. at no time deducted any of the alleged taxes from the dividends paid to its stockholders.

The application for hearing and the proofs before the Tax Commission at the hearing showed in tabulated form the total amounts received by Wisconsin residents upon the payment of the dividens in question, the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (based on the computation used
144 by the Tax Commission in reaching assessments, and the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings (on the basis of figures originally used by the Tax Commission). On the basis of the Wisconsin Tax Commission's recomputations as provided by the decision from which this appeal is taken, the tax allocable to dividends received by Wisconsin residents allocable to Wisconsin earnings, would be:

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Dividend Date	(1)		(2)		(3)
12/2/35	$8,758.20 x	.019977	$174.96 x	2½%	$4.37
3/2/36	7,914.60 x	.023552	186.40 x	"	4.66
6/1/36	7,696.20 x	"	181.26 x	"	4.53
9/1/36	7,767.00 x	"	182.93 x	"	4.57
12/1/36	7,780.20 x	"	183.24 x	"	4.58
3/1/37	8,032.80 x	.022966	184.48 x	"	4.61
				Total	$27.32

(1) represents the total amounts received by the Wisconsin residents on the payments of the respective dividends

(2) represents the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings, based on the percentages finally determined to be used by the decision of the Wisconsin Tax Commission

(3) represents the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings.

The record before the Commission further contains undisputed proof that compliance with the statute would require the appellant to perform numerous clerical operations in the State of New York each time a dividend is paid, all resulting in additional expense to the Company.

The record further affirmatively shows that full disclosure has been made to the Wisconsin Tax Commission of all income received by the company and all dividends paid by it, during the period involved on this appeal.

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145 Under date of December 19, 1938, the Wisconsin Tax Commission rendered its decision, a copy of which is attached hereto and marked Exhibit I, wherein it denied the claim for refund made on account of tax paid under protest in respect to the December 2, 1935 dividend, and ordered that the additional assessment was properly made, but that the same should be recomputed at the rate of a straight 2½% rather than at .02564, the rate originally used by the Commission, and also ordered that it should be recomputed so that the dividends on treasury stock should be subjected to tax. It is from this order and decision that the F. W. Woolworth Co. appeals. The recomputation of tax as ordered by the decision is reflected in Exhibit II attached hereto.

ASSIGNMENTS OF ERROR.

(1) The Wisconsin Tax Commission erred in deciding and ordering that the assessment, or any part thereof, was valid and in ordering that the assessment as recomputed be placed on the tax roll.

(2) The Wisconsin Tax Commission erred in refusing to order a refund in favor of the F. W. Woolworth Co. on account of the purported tax paid under protest by said company in the amount of $2515.61 on account of the dividend paid by the F. W. Woolworth Co. on December 2, 1935.

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(3) The Wisconsin Tax Commission erred in its findings and decision and order that the Wisconsin Privilege Dividend Tax law was constitutional as applied to any of the dividends paid by the F. W. Woolworth Co., which are involved in this appeal.

(4) The Wisconsin Tax Commission erred in any event in determining that the Wisconsin Privilege Dividend Tax law was constitutional so
146 far as it was applicable to payments of dividends to such of the stockholders as were non-residents of Wisconsin.

(5) The Wisconsin Tax Commission erred in its findings and decision and order that the assessment should be revised to subject to tax dividends on treasury stock and in ordering a computation of the tax on any base which includes dividends on treasury stock.

(6) The Wisconsin Tax Commission erred in refusing to pass upon the constitutionality of the Wisconsin Privilege Dividend Tax law as applied to the F. W. Woolworth Co.

PROPOSITIONS OF LAW RELIED UPON BY TAXPAYER IN THIS APPEAL.

(1) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the

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United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the F. W. Woolworth Co. and/or its stockholders of property without due process of law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin, when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin, except the receipt of such dividends as were paid to Wisconsin stockholders.

Furthermore, the funds from which such dividends were paid can not be said to be Wisconsin funds, but are general funds of the company deposited in New York banks and derived from re-
147 mittances from stores and subsidiary corporations in practically all of the states and from several foreign countries.

That the State of Wisconsin has no power to levy any excise tax on the privilege of receiving and paying out dividends since said privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted under the laws of the State of New York and exercised solely pursuant to the laws of said state.

That even if said law might be held to be constitutional from a jurisdictional standpoint insofar as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the state and/or as to dividends paid by Wisconsin corporations, said act so ap-

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plied would be contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article VIII, Section 1 of the Constitution of the State of Wisconsin, since it would be a denial of the equal protection of the laws to residents of Wisconsin and as to Wisconsin corporations it would not be uniform and would contain unreasonable exemptions.

That the tax is on the payment and receipt of dividends and that as it is in part levied upon an unconstitutional subject and as no basis for apportionment exists, the whole assessment is invalid.

That it is apparent from the structure of Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, under which this tax is assessed, that the legislature contemplated that a tax would be imposed upon all dividends paid from earnings derived from business and property within the state. To restrict the application of the law to dividends received within the State of Wisconsin would so alter and restrict it that it is apparent the legislature would not have passed it in so limited a form. Consequently the entire law is ineffective, notwithstanding the provisions of Section 4 of
148 Chapter 505 of the Laws of 1935 and amendments thereto.

That even if the tax might be held to be valid insofar as it levies a tax on dividends paid to and received by Wisconsin residents within the state, it is invalid insofar as it purports to levy a tax on dividends paid and received outside of Wiscon-

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sin by non-residents of Wisconsin. In such cases the entire payment and receipt of said dividends takes place outside of the State of Wisconsin, and consequently said state has no jurisdiction to levy an excise tax. That all except $27.32 of said assessment represents taxes levied upon the payment of such dividends. This proportion is presented as an alternative and is not to be construed as an admission that the law is valid insofar as it taxes dividends paid to Wisconsin residents or as an abandonment of the principal position taken that the whole law and the tax assessed thereunder is invalid.

(2) That the said law is further unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, because it is a direct tax upon the F. W. Woolworth Co. stock. The State of Wisconsin has no jurisdiction to tax said stock insofar as it is owned by persons not residing within the state. All of the tax except $27.32 thereof was levied with respect to dividends paid upon stock owned by non-residents of the State of Wisconsin.

(3) That said Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin,

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in that it deprives the F. W. Woolworth Co. of liberty and property without process of law, in that it requires it to file returns, keep detailed
149 figures and accounts, to collect the tax by making deductions from dividends paid, and to perform numerous other acts within the State of New York. The State of Wisconsin has no jurisdiction to require the F. W. Woolworth Co. to do such acts within the State of New York in order to assist it in collecting the tax levied by said section and the amendments thereto.

(4) That said Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, because when declared a dividend becomes a debt of the company. The tax is in effect a direct tax on such debt which has no taxable situs in the State of Wisconsin.

(5) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, because it attempts to levy a tax upon dividends paid from earnings accumulated before its passage. That annual earnings can not be apportioned as to time and therefore the tax is uncon-

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stitutional as to 1936 and 1937 dividends as well as to dividends paid in 1935. Because it is retroactive and in effect a tax upon accumulated surplus, it does not have a taxable situs in the State of Wisconsin.

(6) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article VIII, Section 1 of the Constitution of the State of Wisconsin, because it attempts to impose an excise on the payment and receipt of dividends paid out of Wisconsin earnings. Other earnings are exempt.
150 Said exemption is a denial of the equal protection of the laws and unreasonable. Said tax is also not uniform.

(7) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article I, Section 10 of the Constitution of the United States of America and under Article I, Section 12 of the Constitution of the State of Wisconsin, because it impairs the obligation of contracts. Said law impairs the contract of the stockholders with the corporation under the general corporate charter and under the dividend resolutions by which the shareholders received a right to the dividends in question. Said law further impairs the contract of the corporation with the States of New York and Wisconsin.

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(8) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article IV, Section 1 of the Constitution of the United States of America, because it fails to give full faith and credit to the laws of New York and the corporate charter, by-laws and resolutions of the F. W. Woolworth Co. drawn pursuant thereto, which give it the right to conduct its business and declare dividends in the State of New York.

(9) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article I, Section 8 of the Constitution of the United States of America, because it interferes with the power of Congress to regulate commerce among the several states. Said law interferes with the free transmission of corporate funds from state to state.

(10) Said assessment is further void because the same was calculated pursuant to the statutory presumption under Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, that the dividends in question were paid from the previous years' income and contain an exact proportionate part of the Wiscon-
151 sin earnings for such year. Such presumption contained in the law in question is plainly not in accord with the true facts and has been rebutted by the proof as made, and if not so rebutted the same is void, as arbitrary and unreasonable and

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unconstitutional under the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Wisconsin Constitution.

(11) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the F. W. Woolworth Co. and/or its stockholders of liberty and/or property without due process of law, in that it imposes upon non-resident stockholders what is in effect a tax upon income of such stockholders although such income is not earned within the State of Wisconsin nor derived from property or business conducted within such state.

(12) That said assessment is modified and corrected by the Wisconsin Tax Commission, insofar as it includes as part of the base upon which computation of tax is made so-called "dividends" on treasury stock owned by the company, is void in that Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto does not contemplate that such so-called "dividends" be subjected to tax.

The appellant herein has availed itself of the remedies provided by the Statutes of the State

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of Wisconsin, and particularly Sections 71.12, 71.14 and 71.17.

F. W. WOOLWORTH CO.,

By A. L. CORNWELL,
Vice President,

DAVIES, AUERBACH & CORNELL,
One Wall Street, New York City.

ELA, CHRISTIANSON & ELA,
One West Main Street, Madison, Wis.

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William T. Pullman,
Emerson Ela,
G. Burgess Ela,
Of Counsel.

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Office of

WISCONSIN TAX COMMISSION

MADISON, WISCONSIN

In the Matter of the Appeal of)
) Exhibit I
F. W. WOOLWORTH COMPANY,)
a Corporation,)
)
from an Assessment of Privilege)
Dividend taxes with respect to Divi-)
dends paid on March 2, 1936, June 1,)
1936, September 1, 1936, December 1,)
1936, and March 1, 1937; and from the)
Denial of a Claim for Refund of Priv-)
ilege Dividend Taxes paid with re-)
spect to Dividends paid on December)
2, 1935)

DECISION.

The taxpayer, the F. W. Woolworth Company, appeals to the Tax Commission from a denial of a claim for refund of privilege dividend taxes paid in respect to the dividends paid in December 1935, and more particularly to the question of whether the privilege dividend tax law will be construed to impose a tax with respect to so-called dividends paid on treasury stock.

The taxpayer herein, F. W. Woolworth Company, is a corporation organized under the laws of the State of New York which conducted during the period here involved a retail merchantile

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business in the State of Wisconsin and in other states and foreign countries. Its dividends were declared by the Board of Directors, meeting in New York, New York, and paid by a transfer agent. The method of payment was that one check was issued by F. W. Woolworth Company to the transfer agent for the total amount of the dividends and the transfer agent then prepared and mailed dividend checks to the stockholders

During the period involved, F. W. Woolworth Company held shares of its own stock in its treasury. The check issued to the transfer agent included amounts sufficient to pay dividends upon such treasury shares and dividend checks were received from the transfer agent with respect to such shares. The privilege dividend tax return and the statement of dividends declared and paid did not include the amounts thus transferred with respect to treasury shares, and there is nothing
153 in this case to indicate that F. W. Woolworth Company held treasury stock or that funds were paid to the transfer agent and turned back with respect to such stock until it developed that such was the fact on the hearing of the action on April 23, 1938.

The taxpayer argues that the corporation cannot be said to have derived anything from the treasury stock by virtue of a transaction by which it receives from its own agent a check representing money of which it is already the owner. Nothing is derived by the transfer of money from one account to another. After the transaction the corporation has exactly what it had before. The

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fact, however, is that this taxpayer, a corporation, did declare a dividend on the treasury stock the same as on other stock owned by individuals.

Subsection (1) of the privilege dividend tax law imposes a tax on dividends out of income derived from property located and business transacted in this state, declared and paid by all corporations. Subsection (7) provides that dividends shall be defined as in Section 71.02. The latter section provides in part:

> "the term 'dividends' as used in this section shall be held to mean all dividends derived from stocks whether paid to its shareholders in cash or property of the corporation."

The courts have held that treasury stock is issued capital stock re-acquired by the issuing corporation. Such stock is property of the corporation, an asset which may be sold.

Frank Gilbert Paper Co. vs. Prankard, 204 App. Div. 83, 198 N. Y. S. 25;
Enright vs. Heckscher, 240 F. 863, 153 C. C. A. 549;
Borg vs. Internation Silver Co., 11 F. (2d) 143;
Goldstein-Findberg Co. vs. State Board of Assessors, 83 Atl. 773.

The taxpayer is a New York corporation. The taxpayer and the Income Tax Division differ as

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to the application of the case of *Hartley vs. Pioneer Iron Works,* 181 N. Y. 73, 73 N. E. 576. In that case, it is held that dividends may be declared on treasury shares, to be applied to the purchase price of the shares for the benefit of certain persons who have contracted to buy them. In the case before the Commission, the corporation paid the dividends on its treasury stock. The money was turned over to the fiscal agent
154 and a dividend check was returned to the corporation. These transactions cannot be ignored and under the rule in the *Hartley* case they constitute a declaration in payment of a dividend which should be included in the base upon which the privilege dividend tax is computed.

It is apparent that the Income Tax Division used a wrong rate in this instance, using 2.5651% instead of the tax rate of 2.5%.

Another question the taxpayer raises is the constitutionality of the Wisconsin privilege dividend tax law. The Wisconsin Tax Commission has repeatedly held that it has no right to consider the constitutionality of this law, particularly because of the opinion in *State ex rel. Froedert Grain and Malting Co. vs. Tax Commission of Wisconsin,* 267 N. W. 52, wherein the supreme court held the law constitutional.

FINDINGS.

The Tax Commission, therefore, finds, that the assessment is not constitutionally objectionable,

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and the Commission cannot assume the power of invalidating the taxing statute;

It further finds that the tax should be re-computed at the rate of 2.5%, the assessment further revised to subject to tax the dividends paid upon treasury stock, and the assessment so modified as to rate and revised as to base be confirmed.

DECISION.

IT IS, THEREFORE, THE DECISION OF THE TAX COMMISSION, That a revision of the assessment against the F. W. Woolworth Company, a New York corporation, be made, using the 2.5% tax rate, and that the privilege dividend tax be re-computed to include dividends paid on the treasury stock of said corporation.

IT IS FURTHER ORDERED, That the entire assessment as re-computed be placed on the tax roll, and a proper notice be given to the parties to this appeal of this decision.

Dated at the State Capitol, Madison, Wisconsin, this 19th day of December, 1938.

155 WISCONSIN TAX COMMISSION,
W. J. CONWAY,
HENRY A. GUNDERSON,
HERBERT L. MOUNT,
Commissioners.

156 **Exhibit II—Folded insert.**

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158-159 ANSWER OF WISCONSIN TAX COMMISSION ON APPEAL TO CIRCUIT COURT.

(Title omitted.)

158 For answer to the objections raised by the Appellant in the above-entitled action, the Respondent, appearing by the Attorney General and Harold H. Persons, Assistant Attorney General, say that the assignments of error are without support in the law, or in the facts as shown by the record made up of copies of all the documents, papers, evidence, statements and exhibits on file in the matter and all the testimony taken down, returned into court pursuant to Sec. 71.16, Wisconsin Statutes.

JOHN E. MARTIN,
Attorney General,

HAROLD H. PERSONS,
Assistant Attorney General,
Attorneys for Respondent.

160 *ADMISSION OF SERVICE* of Brief of Appellant on Appeal to Circuit Court.

(Omitted.)

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1-135 **Record Before Wisconsin Tax Commission, Returned to Circuit Court of Appeal.**

1 *RETURN* of Wisconsin Tax Commission on Appeal to Circuit Court.
(Omitted.)

2-6 *INDEX TO PROCEEDINGS* Before Wisconsin Tax Commission.
(Omitted.)

7-33 TRANSCRIPT OF TESTIMONY BEFORE WISCONSIN TAX COMMISSION.

7-9 *COVER OF TRANSCRIPT*, Index to Transcript, Recital of Appearances.
(Omitted.)

10 Mr. Best: If the Commission please, on this appeal of F. W. Woolworth Company—this involves two matters, one, the taxpayer's protest of hearing with respect to an assessment of dividend taxes on dividends declared and paid in 1936 and in 1937, and the other being a request for hearing on a denial of a claim for refund of privilege taxes paid in January of 1936 with respect to a dividend paid on December 2, 1935.

The situation with respect to the use of the percentage of 2.5641 instead of the percentage of 2.5 for the computation of the tax is the same in this matter as it was in the appeal of J. C. Penney Company, and we concede that the tax rate to be applied to that portion of the dividends which is income from Wisconsin property and business should be 2.5 per cent.

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Mr. Ela: And that the computation on that basis will be incorporated in your decision in the matter and made a part of that record in that method.

Mr. Best: Yes.

Mr. Ela: Showing the total amount of tax claimed, is what I want somewhere in this record.

Papers marked Exhibits 1, 2, 3, 4, 5, 6, and 7, AJK.

Mr. Best: We offer in evidence at this time the stipulation of facts between the parties, which the reporter has marked Exhibit 1.

The document which the reporter has marked Exhibit 2 being the privilege dividend tax return of F. W. Woolworth Company with respect to dividends declared October 9, 1935 and paid December 2, 1935, the amount of tax being $2515.61,
11 that being the amount paid and now the amount for which refund is claimed; attached to which is the taxpayer's protest against the payment of the tax.

Mr. Ela: All of which is offered as part of the exhibit.

Mr. Best: Exhibit 2. We offer in evidence a document Exhibit 3, the first sheet of which is a copy of a letter dated February 17th, 1937 from Wisconsin Tax Commission to F. W. Woolworth Company; the next sheet of which is a letter dated February 20, 1937 from F. W. Woolworth Co. to Wisconsin Tax Commission. The next sheet of the Exhibit 3 is a copy of a letter dated March 2, 1937, from Wisconsin Tax Commission

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to F. W. Woolworth Company. The next sheet of the exhibit is a letter dated March 23, 1937 from F. W. Woolworth Company to Wisconsin Tax Commission. The next four sheets of the exhibit are enclosures accompanying the letter dated March 23rd, 1937, the first sheet of the enclosures being the 1934 separate accounting data of F. W. Woolworth Company; the second sheet of the enclosures being the 1935 separate accounting data of the same corporation; the third sheet of the enclosure being the 1936 separate accounting data of that corporation. The fourth sheet of the enclosure being an analysis of surplus account. The next sheet of the exhibit is a copy of letter dated March 31, 1937 from Wisconsin Tax Commission to F. W. Woolworth Company, attached to which is a return receipt for registered mail. The next two sheets of the exhibit are schedules which were enclosures with the letter dated March 31, 1937, showing the computation of the dividend tax and the computation of adjusted total income.

12 The next sheet of the exhibit is a letter dated April 6, 1937 from F. W. Woolworth Company to Wisconsin Tax Commission. The next sheet of the exhibit is a copy of a letter dated April 12, 1937 from Wisconsin Tax Commission to F. W. Woolworth Company, attached to which is a receipt for registered mail. The next sheet of the exhibit is a schedule which accompanied the letter dated April 12, 1937 showing an adjusted computation of privilege dividend tax made by the Tax Commission. The last sheet of the exhibit is a copy of a letter dated July 17th, 1937 from Wisconsin Tax Commission to F. W. Woolworth Com-

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pany attached to which is a return receipt for registered mail.

The report has marked as Exhibit 4 document consisting of four sheets, the first sheet being a telegram from Davies, Auerbach and Cornell to Wisconsin Tax Commission dated July 30, 1937; the second sheet being a copy of a telegram from Wisconsin Tax Commission to Davies, Auerbach and Cornell dated July 30, 1937; the third sheet being a telegram dated August 23rd, 1937 from Davies, Auerbach and Cornell to Wisconsin Tax Commission; and the fourth sheet being a copy of a telegram from Wisconsin Tax Commission to Davies, Auerbach and Cornell, dated August 24th, 1937.

The reporter has marked as Exhibit 5 a document consisting of three sheets, the first one being a copy of a letter dated September 1st, 1937 from Wisconsin Tax Commission to Gilbert, Ela, Heilman and Raeder; the second sheet being a letter dated October 4th, 1937 from Ela, Christianson and Ela to Wisconsin Tax Commission, and the
13 third sheet being a copy of a letter dated October 5, 1937 from Wisconsin Tax Commission to Ela, Christianson & Ela.

Mr. Ela: All of which pertains to an extension of time chiefly, does it not?

Mr. Best: To the right to amend the application for hearing and the receipt of the amended application.

The reporter has marked as Exhibit 6 a copy of a letter dated March 31, 1938, from Wisconsin Tax Commission to F. W. Woolworth Company, attached to which is a return receipt for regis-

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tered mail, that being the letter notifying the taxpayer of the date of this hearing.

And the reporter has marked as Exhibit 7 a document consisting of two sheets, the first sheet being a copy of a letter from the Wisconsin Tax Commission to F. W. Woolworth Company dated April 1, 1938, denying the taxpayer's claim for refund of privilege dividend taxes; the second sheet being the application for hearing on denial of refund filed by F. W. Woolworth Company, undated, but bearing the Wisconsin Tax Commission stamp showing that it was received by the Commission on April 1, 1938.

We offer in evidence Exhibits 1 to 7, inclusive.

Mr. Ela: Well, subject to our examining them —they have been offered here pretty rapidly. I assume they are all right but I would like the privilege of examining them and offering any objections if we find any.

Commissioner Mount: What was Exhibit 1?

Mr. Best: Stipulation of facts.

Mr. Ela: No objection to that because we signed it.

14 Mr. Best: That is all we have just now. We request that the taxpayer's original application for hearing and refund, filed with the Tax Commission August 1, 1937, be marked Exhibit 8.

Mr. Ela: We have no objection.

Commissioner Mount: That is the application for refund?

Mr. Best: Application for refund and hearing. And that the amended application for refund and hearing be marked Exhibit 9, and both of these documents be made a matter of record.

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Commissioner Conway: Let the record show they will be so considered a part of the record.

J. T. LEFTWICH called as witness on behalf of appellant:

Direct Examination.

My name is J. T. Leftwich. I reside in Essex County, New Jersey. I am assistant secretary and assistant treasurer of the F. W. Woolworth Co. and as such I have access to all the books and records of the corporation, and I am as such re-
15 sponsible for the preservation of such books and records. As one of my special duties as assistant secretary I have charge of the taxes for the company. (Exhibit 10 marked for identification.) Exhibit 10 is a tabulation which accurately and truthfully discloses the facts shown thereon. I have shown thereon a tabulation opposite the dividend date so called the total shares except treasury shares, the total number of stockholders, the total dividends paid except on treasury shares, the number of Wisconsin shareholders, the number of shares held by Wisconsin residents, dividends paid to Wisconsin residents and the percentage of dividends paid to Wisconsin residents. Taking for illustration the March 1, 1937 date, which is the date of one dividend, we had total shares except treasury on that date of 9,703,613
16 and there were 51,104 stockholders, and of that total number of stockholders 468 were residents of Wisconsin. The residents of Wisconsin held a total of 13,388 shares of the total of 9,703,613

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shares, and our total dividends paid on that date were $5,822,167.80 and the total amount of dividends paid to Wisconsin residents on account of their ownership of stock on that date was $8032.80, and the percentage of the dividend paid to Wisconsin residents was .1379%, which is less than 1%. All of the percentages in the column of percentages show that less than 1% of the dividends were paid to Wisconsin residents. (Exhibit 10 offered and received in evidence.) With respect to
17 the method and procedure used in the paying of dividends, the dividends are declared by the Board of Directors at meetings held at 233 Broadway, New York, and paid by our transfer agents, City Bank, Farmers Trust Company, 22 William Street, New York. The checks are written by that transfer agent and we issue one check to the transfer agent for the total amount of dividends payable. That transfer agent is a bank in New York City. The dividends are then transmitted to the stockholders by placing the same in the mail in New York City. Our board of directors adopts a form of resolution at the time of declaring the dividend. No act regarding the declaring or paying or transmitting of the dividend is performed within the State of Wisconsin, and there was no
18 such act performed during any of the years 1935, 1936 or 1937. The only possible element that could be involved occurring within the State would be the Wisconsin stockholder receiving through the mail from New York an enclosure with statement of his dividend and the check for the amount of the dividend. We have stores operating in

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Wisconsin and in all of the other states of the Union. The gross receipts from sales from the stores in Wisconsin is handled in the following manner: after the money gets into the till of the local store from gross receipts from sales the local manager pays local bills such as salaries and small supplies that he needs in the store. He deposits the balance above those requirements in a local bank. That bank maintains the money and periodically our Minneapolis office draws on the bank account. The manager has no jurisdiction over the money after it is placed in the bank account and has nothing to do with the transmittal of the money from the local bank. No one in Wisconsin has anything to do with the withdrawal of that money from any Wisconsin bank. This surplus money in the Wisconsin bank is taken to the Minneapolis office where it is combined with money received from banks in various other states under the jurisdiction of the Minneapolis office. No attempt is made to keep the money separate from the different states. The Minneapolis office uses this money in the payment of merchandise bills, alteration, improvements accounts or any other expenditures that they have. From time to time the Minneapolis office accumulates sufficient funds above their requirements, and those are transmitted to the main office in New York, placed in the bank account in New York, from which bank account money is from time to time transferred to the City Bank, Farmers Trust Company, from which the dividends are paid. The general corporation expenses are paid out of the funds in

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New York under the direction of officers who have their offices in New York City and who perform their duties in New York City. This is true of such things as general corporation salaries and taxes. The stock records are kept in New York City with the City Bank, Farmers Trust Company. None of the stock records are kept in Wisconsin. None of the meetings of the Board of Directors of the company have ever been held in the State of Wisconsin. No meetings of stockholders have ever been held in the State of Wisconsin. Stockholders' meetings are held at Watertown, New York. In the payment of dividends we do not make any attempt to earmark any particular source of the money from which the dividends are paid or any particular period during which the moneys were produced which were used
21 for payment of dividends. The dividends are paid out of the general funds of the company. Those general funds are kept on deposit in other banks than the City Bank, Farmers Trust Company. At the time of the dividend we leave with the City Bank, Farmers Trust Company the amount required to pay the dividend. In connection with the claim for refund that has been made on behalf of the company, we did not deduct any part of it from the dividends sent out to stockholders nor have we ever recovered any part of it from them or asked them to refund it to us, so that at the present time it is a claim of the Woolworth Co. The determination of the amount of dividends that each stockholder is to receive is

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made by resolution. The City Bank, Farmers
22 Trust Company after the amount of dividend is fixed, make up a tabulation according to their stock records with reference to what each stockholder is to receive. They are compensated by Woolworth Co. for their services and if they were required to make additional and further deductions or computations in order to deduct the amount of tax from each dividend sent out to stockholders, no matter where they lived, there would be additional expense to our company. Our company has filed income tax returns within the State of Wisconsin as required, and to the best of our ability we have disclosed the true facts regarding our income and all of it and have concealed nothing. We have filed a dividend tax report on the items now claimed by the State of Wisconsin but did not pay the taxes that are claimed because we are challenging the validity of the statutes, and in that report we have dis-
23 closed the true and correct facts so far as we know.

Cross Examination of J. T. Leftwich.

F. W. Woolworth Co. is licensed to do business in Wisconsin and filed income tax returns for each of the years 1934, 1935 and 1936. The Wisconsin income tax computed on those returns is by separate accounting, that is, the expenses in connection with each store after the deduction of the cost
24 of the merchandise was accounted for, was apportioned to all the stores and the expenses appor-

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tioned to the Wisconsin stores were deducted from the Wisconsin income. In those general expenses were office expenses including office expense of the New York office, including expenses for transfer fees and also the allocation of the federal income taxes which were paid from New York. The merchandise purchasers were paid from Minneapolis. The general officers' salaries and the expenses of the New York office were paid from New York out of funds in New York banks. In each of the years 1934 to 1936, inclusive, F. W. Woolworth Co. reported a net income to Wisconsin in
25 excess of $25,000.00. The gross sales in Wisconsin by the stores located in this state during those years was something in excess of $6,000,000.00 in each of the years. Referring to Exhibit 10, the heading of the second column on that exhibit is total shares except treasury. The heading of the fourth column is total dividends paid except on treasury shares. The third sheet of Exhibit 3, being a letter from F. W. Woolworth Co. to Wisconsin Tax Commission dated March 23, 1937, signed by me, shows that the total amount of dividends agree with the total amount shown on Exhibit 10. It reflects that the amount for each dividend date was $5,822,167.80. There is nothing said in Exhibit 3 that those dividends are excluding
26 dividends on treasury stock. Dividends on treasury stock come back to the company but not as income. It is used as a surplus item on the company's books but there is in fact enough money transferred to our transfer agents to de-

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clare dividends on the shares of stock including treasury stock, and we receive back from the transfer agent a dividend check with respect to the treasury stock. I will supply to the Commission by letter the number of treasury shares as of each of these dividends dates and the amount of the check which was received from the transfer agent with respect to the dividends on these treasury shares. In 1934, 1935 and 1936 F. W. Woolworth Co. had in the neighborhood of 55 stores
27 in Wisconsin. Each of those stores had a bank balance.

28 Exhibit 11 is a schedule showing the cash in banks in the State of Wisconsin at the end of the years 1934, 1935 and 1936 and was prepared under my supervision from the books of the company (Exhibit 11 offered in evidence). The organization maintained in Minneapolis by the company is what we call a district office. They have complete supervision of a certain number of stores. Our Minneapolis office takes in Minnesota, part of North Dakota, Iowa, part of Nebraska, part of Michigan, and Wisconsin, and the men travel from there to stores in Wisconsin to supervise the activities and audit the books of the company. There is probably a staff of one hundred at the Minneapolis office and they supervise about 150 to 165 stores. No work is done in Wisconsin from the Minneapolis office except that the traveling auditor makes his visits here and supervises
29 the stores and makes reports on them to his chief in Minneapolis. We call our auditor the superin-

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tendent and he does exercise some supervision over the management and over the purchases of merchandise of the Wisconsin stores. He is formerly a store manager and knows the operation of the store thoroughly and also makes the audits of the accounts. In addition to the traveling auditor other Minneapolis employes visit the Wisconsin stores, such as the District Manager and Assistant District Manager and what we call the merchandise men make periodical visits to Wisconsin. The Minneapolis office determines what merchandise the Wisconsin store shall buy and in what quantities. The orders go through the Minneapolis office for merchandise before it is placed with the manufacturer. The order for merchandise shows the quantity on hand and the quantity last ordered and the history of the items, and the merchandise man who is a trained man can tell from the size of the store whether the
30 order is excessive. The store manager can not determine to sell any new item of merchandise in Wisconsin stores. If a new line of goods is to be sold the Minneapolis office assigns them to the Wisconsin stores. We have representative stores in which we place new items until they are tried, and if they are proven then the size of the store depends upon the quantity that is assigned to each. The Minneapolis office supervises the layout of the store and the place in which different types of merchandise are to be displayed. The Minneapolis office in turn is supervised by the New York office. The nature of that supervision is that the executive office has what we call a rep-

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resentative and he visits the district office and
31 also a representative number of stores. He is a New York man and he may visit stores in Wisconsin from time to time. The Minneapolis office makes the leasing arrangements. The individual store records are kept in Minneapolis. I have stated that funds from the different stores are sent from Wisconsin to Minneapolis. We have ten other transfer offices in the United States besides the one at Minneapolis. We never maintained one in Wisconsin nor in Michigan. We have one in Chicago, Illinois. The stores in Wisconsin were under the jurisdiction of our Chicago office prior to 1918, at which time our Min-
32 neapolis office was opened. We keep a separate set of books for each store in Wisconsin in our Minneapolis office and the returns have been based upon information shown in those records.

"Mr. Best: One thing more, I think the record ought to show the original and amended applications for hearing in this matter contain some objections to the method of computation which the Commission used, and as I understand it those objections have been withdrawn with the exception of the percentage higher than 2 1/2.

"Mr. Ela: I understand that is true."

35 *LETTER* from Attorneys for Appellant, Withdrawing Objections to Certain Exhibits.

(Omitted.)

39-45 *DECISION* of Wisconsin Tax Commission (the Decision of the Wisconsin Tax Commission is At-

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tached as an Exhibit to the Notice of Appeal—R. 152-153, C. 22-25, and is Consequently Omitted at This Portion of the Case).

46-47 *LETTER* of Wisconsin Tax Commission and Return Receipt to Appellant, Dated December 22, 1938, Enclosing Decision and Assessment of Additional Tax.

(Omitted.)

48-49 *RECOMPUTATION* of Privilege Dividend Tax Enclosed in Letter of Wisconsin Tax Commission of December 22, 1938, Giving Effect to Decision of Tax Commission (this is Attached as an Exhibit to Notice of Appeal—R. 156, C. 66).

50-53 *EXHIBIT 1,* Partial Stipulation of Facts on Application for Hearing on Objections to Assessment and on Objections to Order Disallowing Claim for Refund.

(Title omitted.)

50 *WHEREAS,* the above entitled matter is pending before the Wisconsin Tax Commission upon the amended application of F. W. Woolworth Co., a New York corporation, for hearing on objections to assessment dated July 17th, 1937, and on order of the Wisconsin Tax Commission denying the claim for refund of said F. W. Woolworth Co. on account of tax paid in the amount of $2515.61 on January 29th, 1936, and

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WHEREAS, it appears that certain of the facts in connection with the matters set forth in the amended application for hearing and objections are not in dispute and that certain facts can be stipulated which will result in simplifying the proofs to be offered at the time of hearing in the above captioned matter,

NOW, THEREFORE, IT IS HEREBY STIPULATED between the Wisconsin Tax Commission and F. W. Woolworth Co., by their respective attorneys as follows:

51 1. That on the 17th day of July, 1937, the said F. W. Woolworth Co. received notice of additional assessment of privilege dividend tax in the principal amount of $17,959.19 together with interest and penalties thereon; that on or about January 29th, 1936 the said F. W. Woolworth Co. paid to the Wisconsin Tax Commission the sum of $2,515.61 on account of dividend paid by it on December 2nd, 1935, and that thereafter application for refund of said tax was made, and that said application for refund was denied by the Wisconsin Tax Commission, that the application for hearing on account of the additional assessment above referred to and the application for hearing on order disallowing the refund above referred to, have been duly filed with the Wisconsin Tax Commission within the time provided by law.

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2. That the F. W. Woolworth Co. is a New York corporation which conducts, and at all times mentioned in the application did conduct, a retail mercantile business in twenty-nine states of the United States (including Wisconsin), the District of Columbia and Cuba; that the company also owns all or part of the stock of corporations engaged in a similar business in the other nineteen states of the United States, Canada, Great Britain and Germany; that the statutory principal office of the company at which meetings of stockholders are held is at the Woolworth Building, Watertown, New York; that the principal business office at which meetings of directors are held is at the Woolworth Building, New York, New York.

3. That all meetings of the board of directors of the company at which dividends are declared are held in the State of New York; that all acts of the company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York, and that the funds out of which such dividends are paid are kept in the
52 State of New York.

4. It is expressly stipulated and agreed that the facts herein set forth shall be accepted as proven, and that additional and supplementary proofs may be made at the time set for hearing

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on the application for hearing hereinbefore referred to.

Dated, April 6, 1938.

WISCONSIN TAX COMMISSION,
By JOHN S. BERK,
Its Attorney,

F. W. WOOLWORTH CO.,
By ELA, CHRISTIANSON & ELA,
Its Attorneys.

54-57 *EXHIBIT 2,* Return of F. W. Woodworth Co., dated January 24, 1936, Reflecting Dividend Paid on December 2, 1935, and Letter Accompanying Return Showing Payment Made Under Protest.

(Copy of return omitted.)

55 F. W. WOOLWORTH CO.,

233 Broadway, New York, N. Y.

Privilege Dividend Tax Return, Jan. 31, 1936.

To the Wisconsin Tax Commission:

F. W. Woolworth Co., a New York corporation, doing business as a foreign corporation in the State of Wisconsin, having its principal office at Watertown, Jefferson County, New York, and its principal office in Wisconsin at 1-5 East Main Street, Madison, hereby files under protest the Privilege Dividend Tax Return and hereby pays under protest the sum of $2515.61 which are required to be filed and paid, respectively,

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under the alleged authority of Section 3 of Chapter 505 of the Laws of 1935 as amended by Chapter 552 of the Laws of 1935.

1. Protest is made against the requirement of such return and the exaction of such tax and each and every part thereof, on the ground that such tax is invalid and contrary to the rights of F. W. Woolworth Co. under the Constitution and Laws of the State of Wisconsin and the Constitution and Laws of the United States.

2. Without prejudice to the rights of the Company on the foregoing grounds, protest is made against the exaction of such tax and each and every part thereof, on the ground that it is imposed upon the privilege of declaring dividends, which privilege, in respect of F. W. Woolworth Co., which is a foreign corporation whose dividends are declared in the State of New York, is not within the jurisdiction of the State of Wisconsin to tax, either under the provisions of Artcle VIII, Section 1, or any other section of the Wisconsin Constitution, or under the provisions of the Constitution of the United States.

3. Without prejudice to the rights of the Company on the foregoing grounds, protest is made against the exaction of that part of the tax which is imposed upon the privilege of persons not residents or citizens of the State of Wisconsin to receive dividends, on the ground that it is not within the jurisdiction of the State

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of Wisconsin to tax, either under the provisions of Article VIII, Section 1, or any other section of the Wisconsin Constitution or under the pro-
56 visions of the Constitution of the United States, since such dividends are received as well as paid outside the State of Wisconsin, and on the ground that the said tax is in effect a personal income tax upon non-resident stockholders not subject to the taxing jurisdiction of the State of Wisconsin, the imposition of which deprives such stockholders of their property without due process of law in violation of the provisions of the Constitution and Laws of the State of Wisconsin and of the United States.

Payment of the tax is made solely under compulsion and to avoid the penalties provided by said Act and by the Laws of the State of Wisconsin.

Dated January 24, 1936.

F. W. WOOLWORTH CO.
By A. L. Cornwell
Vice-President.

Attest:

PAUL HOFER, Jr.,
Secretary.

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58-75 *EXHIBIT 3,* Various Letters re Information Requested by Wisconsin Tax Commission.

58 *REQUEST FOR INFORMATION* by Wisconsin Tax Commission to Appellant Dated February 17, 1937.

(Omitted.)

59 REQUEST Dated February 20, 1937, by Appellant for Additional Time Within Which to Furnish Information.

(Omitted.)

60 *LETTER* of Wisconsin Tax Commission Dated March 2, 1937, Granting Additional Time for Furnishing Information.

(Omitted.)

61-66 *LETTER* from Appellant, Dated March 23, 1937, to Wisconsin Tax Commission, in Response to Request for Information and Also Enclosing Schedule with Respect to Operations for the Years 1834, 1935 and 1936.

(Omitted.)

67-69 *LETTER* of Wisconsin Tax Commission to Appellant, Dated March 31, 1937, Enclosing Schedule Showing Computation of Claimed Tax on Dividends Declared and Paid Between September 26, 1935 and March 1, 1937.

(Omitted.)

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70 *LETTER* from Appellant to Wisconsin Tax Commission, Dated April 6, 1937, Acknowledging Receipt of Letter of March 31, 1937, with Reference to Errors in Computation.

(Omitted.)

71-73 *LETTER* Dated April 12, 1937, from Wisconsin Tax Commission to Appellant, and Registered Return Receipt, Enclosing Computation of Alleged Tax on Dividends from December 2, 1935 to March 1, 1937.

(Registered receipt omitted.)

72 April 12, 1937.

F. W. Woolworth Co.,
233 Broadway,
New York, N. Y.

Attention: Mr. J. T. Leftwich,
Assistant Secretary-Treasurer.

Re: 99-9435.

Gentlemen:

In accordance with information submitted in your letter of April 6, we are submitting herewith a corrected schedule showing our computation of Wisconsin privilege dividend tax due upon dividends paid by your corporation from December 2, 1935, to March 1, 1937.

Payment of the additional tax shown on this schedule should be made prior to April 30, 1937,

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in order to prevent the accumulation of further interest.

Very truly yours,

WISCONSIN TAX COMMISSION
Income Tax Division
By:

Auditor

LFD:McC
Enc.

Registered Mail
Return Receipt Requested

73 **Folded insert.**

74-76 *LETTER* of July 17, 1937, of Wisconsin Tax Commission to Appellant, Assessing Additional Privilege Dividend Tax, and Return Receipt.

(Return receipt omitted.)

75 July 17, 1937.

F. W. Woolworth Company,
C/o Mr. Paul Hofer, Jr., Sec'y.,
Woolworth Building,
New York, N. Y.

In Re: 99-9435

Gentlemen:

Chapter 233, Laws of 1937, effective June 15, 1937, adds a new sub-section to the privilege dividend tax law, making applicable to that tax the provisions of the normal income tax law with

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regard to additional assessments, review of assessments, refunds, credits, and collections.

Pursuant to the privilege dividend tax law as thus amended, you are hereby notified of an additional assessment of privilege dividend tax in the principal amount of $17,959.19. The computation of this tax was explained in our letter of April 12, 1937, which also showed the amount of penalty and interest to April 30, 1937. In addition to the amounts set forth in that letter the principal amount of the tax is subject to interest at the rate of one-half of one per cent per month from April 30, 1937, until paid.

If you desire a hearing in this matter, it will be necessary for you to apply therefor in writing stating definitely and in detail your objections to the assessment. Such application must be filed in duplicate within twenty days from the receipt of this notice.

If a hearing is applied for, you may, under Section 71.10 (6) (a) of the Statutes, elect to deposit with the State Treasurer the total amount of the additional taxes set forth above together with interest thereon to the first day of the month succeeding the application for hearing. Your election to so deposit these taxes must be expressed in your application for hearing.

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If no request for hearing is made within the time specified above, this assessment will become final and conclusive.

Yours very truly,

WISCONSIN TAX COMMISSION
Income Tax Division

By: R. F. Kamm, Auditor

RFK:W
Registered Mail
Return Receipt Requested

71-81 *EXHIBIT 4,* Telegrams Requesting and Granting Extensions for Filing of Application for Hearing.

(Omitted.)

82-85 *EXHIBIT 5,* Letters re Amending Application for Hearing on Assessment and Claim for Refund.

(Omitted.)

86-88 *EXHIBIT 6,* Letter from Wisconsin Tax Commission to Appellant, Dated March 31, 1938, and return receipt, Fixing Time for Hearing.

(Omitted.)

89 *EXHIBIT 7,* Denial of Claim for Refund of Privilege Dividend Tax.

(Omitted.)

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90-91 *EXHIBIT 7,* Application for Hearing on Denial of Refund.

(Title omitted.)

90

APPLICATION FOR HEARING ON DENIAL OF REFUND.

The F. W. Woolworth Co., feeling aggrieved by the order of the Wisconsin Tax Commission, dated April 1st, 1938, disallowing its claim for refund of tax paid in the amount of $2515.61 on January 29th, 1936, on account of dividend paid December 2nd, 1935, hereby applies for a hearing before the Wisconsin Tax Commission on the order disallowing such claim, for the reasons set forth in the amended application for hearing filed by the F. W. Woolworth Co. before the Wisconsin Tax Commission on October 4th, 1937 in connection with its application for hearing on an additional assessment and for refund with respect to privilege dividend taxes assessed by the Wisconsin Tax Commission.

F. W. WOOLWORTH CO.
By Ela, Christianson & Ela
Its Attorneys

92-112 *EXHIBIT 8,* Original Application to Wisconsin Tax Commission for Hearing and Refund.

(Omitted.)

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113-132 *EXHIBIT 9,* Amended Application for Hearing and Refund.

(Caption and verification omitted.)

113 AMENDED APPLICATION FOR HEARING AND REFUND PURSUANT TO LAWS OF 1937, CHAPTER 233 AND WISCONSIN STATUTES, SECTIONS 71.12 AND 71.17.

F. W. Woolworth Co., a New York corporation duly authorized to transact business as a foreign corporation in Wisconsin, hereby files objections to an additional assessment of Privilege Dividend Taxes in the principal amount of $17,959.17, in respect of dividends paid by the Company between December 2, 1935, and March 1, 1937, both inclusive, by notice dated July 17, 1937, and pursuant to audit report dated April 12, 1937. In accordance with the Statutes of the State of Wisconsin and particularly Chapter 233 of the Laws of 1937 and Wisconsin Statutes Section 71.12, hereby applies for a hearing and further hereby applies for a refund of tax paid in the amount of $2515.61 on January 29, 1936, on account of dividend paid December 2, 1935, together with interest thereon at 6%.

114 The period prescribed by law within which this application may be filed has been duly extended by the Tax Commission to August 31st, 1937.

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The objections to said assessment and the facts in support of such objections and in support of the claim for refund are as follows:

First: F. W. Woolworth Co., is a New corporation which conducts, and at all times hereinafter mentioned did conduct, a retail mercantile business in twenty-nine states of the United States (including Wisconsin), the District of Columbia and Cuba. The Company also owns all or part of the stock of corporations engaged in a similar business in the other nineteen states of the United States, Canada, Great Britain and Germany. The statutory principal office of the Company at which meetings of stockholders are held is at Woolworth Building, Watertown, New York. The principal business office at which meetings of directors are held is at Woolworth Building, New York, New York.

Second: On each of the dates fixed as a record date for the determination of stockholders entitled to receive each of the dividends upon which a Privilege Dividend Tax has been assessed against the Company there have been in excess of fifty thousand stockholders of the Company residing in all parts of the world holding an aggregate of 9,703,613 shares (exclusive of treasury stock.) On each of said dates the
115 number of such stockholders residing in the State of Wisconsin has been not greater than 470, and the number of shares held by such stockholders has been not greater than 14,597. The number of shares held by and the amount of divi-

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dends paid to all stockholders and stockholders resident in Wisconsin on each of said dates is shown in Table A attached hereto and made a part hereof.

Third: All meetings of the Board of Directors of the Company at which dividends are declared are held in the State of New York; all acts of the Company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York; and the funds out of which such dividends are paid are kept in the State of New York. No act or transaction connected with the declaration and payment of such dividends is done within the State of Wisconsin with the sole exception that certain dividends so declared and paid, amounting, in case of each of the dividends mentioned in Table A, to less than one-sixth of one per cent. of all the dividends declared and paid, are received by stockholders of the Company residing in the State of Wisconsin. The percentage, received by residents of Wisconsin, of the total of each of such dividends is set forth in Table A.

Fourth: The process by which income earned in Wisconsin finally reaches stockholders of the Company is as follows:

116 All the gross income of the Company's stores in Wisconsin, after payment of certain expenses, is sent to a district office outside of the State, where such income is mingled with funds received from stores in other states. After the payment

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by the district office of certain other expenses, all surplus funds are transferred by that office to the principal office of the Company in New York and deposited in a New York bank to the credit of the Company. Out of the sums so deposited are paid general corporation expenses, salaries, taxes, dividends and many other items. All stock records are kept and all dividends are disbursed by City Bank Farmers Trust Company, of New York, which acts as transfer agent and paying agent of the Company. Dividends are not paid out of income received from any particular source or earned in any ascertainable period, but are paid out of the general funds of the Company. The dividend payment is made by drawing a check or checks for the total amount to the order of City Bank Farmers Trust Company, which, itself, makes the actual payments to stockholders.

Fifth: By reason of the facts above stated the transactions upon which the Privilege Dividend Tax is attempted to be imposed in respect of F. W. Woolworth Co., are wholly outside of the jurisdiction of the State of Wisconsin, with the exception of the transfer of dividends by the Company to certain of its stockholders residing within the State of Wisconsin in which case the
117 Transaction takes place partly with and partly outside of the jurisdiction of said State. To the extent that the Privilege Dividend Tax is attempted to be imposed upon transactions wholly outside of the jurisdiction of the State, it is unconstitutional and void and in violation of the

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rights of F. W. Woolworth Co. and of its stockholders residing outside of the State, under the Constitution of the United States, in that it deprives them of liberty and/or property without due process of law.

Sixth: Without prejudice to the statements in Paragraph "Fifth" hereof, the aforesaid Privilege Dividend Tax Law is unconstitutional and void and in violation of the rights of F. W. Woolworth Co., and of its stockholders who reside outside of the State of Wisconsin under the Constitution of the United States in that it deprives them of liberty and/or property without due process of law, because it imposes upon such non-resident stockholders what is in effect a tax upon income of such stockholders, although such income is not earned within the State of Wisconsin nor derived from property or business conducted within such State, and in that it imposes upon F. W. Woolworth Co. a duty of paying and withholding from such stockholders an unconstitutional tax which requires the expenditure of time and money on the part of the Company to compute, pay, and withhold such tax. Although the privilege Dividend Tax Law makes the stock-
118 holders ultimately liable for the amount of the tax the Company, nevertheless, has legal standing to object to the validity of the law for the reason that if the aforesaid Privilege Dividend Tax Law is unconstitutional the Company is being subjected to an unconstitutional burden, and further because in practice it is impossible to with-

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hold the exact amount of the tax from each stockholder, and it therefore becomes necessary for the Company to pay a part of the tax out of its general funds.

Seventh: Without prejudice to the statements in Paragraphs "Fifth" and "Sixth" hereof, the aforesaid Privilege Dividend Tax Law is unconstitutional and void and in violation of the rights of F. W. Woolworth Co. and of its stockholders under the Constitution of the United States, in that it deprives them of property without due process of law by imposing a tax on the privilege of receiving and paying out dividends, which privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted by the State of New York and exercised pursuant to the laws of said State.

Eighth: Without prejudice to the statements in Paragraphs "Fifth", "Sixth" and "Seventh" hereof, the Privilege Dividend Tax is unconstitutional and void insofar as it imposes a tax upon dividends which are paid by the Company to stockholders residing outside of Wisconsin because it is, in effect, a tax upon the stock held by such stockholders, or upon the dividend which is a debt of the Company when declared, which are outside of the jurisdiction of the State and such tax, therefore, deprives F. W. Woolworth
119 Co. and its stockholders, residing outside the State of Wisconsin, of liberty and/or property without due process of law in violation of the

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provisions of the Constitution of the United States.

Ninth: Without prejudice to the statements in Paragraphs "Fifth", "Sixth" and "Seventh" hereof, the aforesaid Privilege Dividend Tax Law is wholly void for the reason that it is unconstitutional as applied to dividends paid to stockholders of the Company residing outside of Wisconsin and to restrict the application of the law to dividends paid by Wisconsin corporations or dividends paid by foreign corporations to stockholders residing in Wisconsin would be a denial of the equal protection of the law to such corporations and such stockholders and a violation of the Constitution of the United States and the Constitution of Wisconsin. Further, to so restrict the application of the law would be to impose a tax which the legislature of Wisconsin did not intend to impose, since, notwithstanding the provisions of Laws of 1935, Chapter 505, Section 4, it is clear that the provisions of the act are based upon a plan to impose a tax which will fall equally upon resident and non-resident stockholders of corporations doing business in Wisconsin and that to so restrict the act would be to defeat the obvious intention of the legislature.

Tenth: Without prejudice to the statements in Paragraphs "Fifth", "Sixth", "Seventh", "Eighth" and "Ninth" hereof, the aforesaid Privilege Dividend Tax Law is unconstitutional
120 and void under Article I, Section 10 of the Constitution of the United States and Article I,

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Section 12 of the Wisconsin Constitution because it impairs the obligation of the contract between the stockholders and the Company under the corporate charter and under the dividend resolutions by which the stockholders received a right to dividends.

Eleventh: The Company has not withheld from dividends paid to its stockholders any part of the dividend tax as required by Laws of 1935, Chapter 505, Section 3, subdivisions (1) and (3). In so failing to deduct such taxes the Company did not intend to admit that it was liable therefor, or to assume any existing liability of its stockholders to pay the tax, but it failed to withhold the tax because it believed that said law was unconstitutional and void and that if the tax was collected from stockholders the Company would be put to trouble and expense to refund to them amounts so withheld from them, and further that the Company would be violating the constitutional rights of its stockholders if it acted as agent of the State to collect a tax levied under an unconstitutional law and that it would be violating the contract rights of its stockholders if it did not pay to them the full amount of the dividend declared by its Board of Directors, deducting therefrom only the amounts of valid taxes which the Company would be constitutionally required to deduct and withhold.

Twelve: The Company claims that the computation by the Tax Commission of the Privilege Dividend Tax alleged to be due as shown in

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Table D and Table E attached hereto is erroneous, even assuming that the aforesaid Privilege
121 Dividend Tax Law is entirely valid and constitutional. The computation which the Company claims is correct, if it be finally determined that the law is entirely valid, is set forth in Table C, which is attached hereto and made a part hereof. The reasons why the Company claims that the computations in Tables D and E are incorrect and the computation in Table C is correct are:

1. The net income of the Company for the years 1934, 1935 and 1936 respectively was $32,142,362.76 for 1934, $31,247,299.83 for 1935 and $32,624,988.45 for 1936; that the dividends paid by the Company in 1935, 1936 and 1937 if they were paid at all out of net income for the previous calendar or fiscal year, were paid out of the income as stated above and as stated at line 3 in Table C and were not paid out of adjusted net income as shown in Table E. The net income of the Company out of which dividends are paid is the entire net income as shown in the books of the Company and is not the adjusted net income which may be used for Federal or State income tax purposes. In determining whether a dividend may lawfully be paid, reference is made solely to the net income and surplus or undivided profits on the books of the Company and not the taxable net income as stated in any Federal or State income tax return. The adjustments which have been made in book income in Table E. are part of the adjustments

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which were made by the Company to reconcile its statement of Federal taxable income with the changes in its surplus as shown by its books.

122 These adjustments were made because of provisions in the Federal income tax law allowing or disallowing certain types of deductions for tax purposes. The Company knows no reason why such adjustments should be made in determining the income out of which dividends are paid and claims that the only proper figures to use are those stated in line 3 in Table C.

2. The rate of tax prescribed by the Privilege Dividend Tax Law is 2.5%. The tax has been assessed upon the Company at the rate of 2.5641%. The reason for the increase in rate is stated to be that inasmuch as the tax is not deducted from the dividends paid to stockholders, the amount of the tax in itself constitutes a further dividend which is also subject to tax and that the tax rate should therefore be adjusted to the rate of 2.5641% in accordance with the second formula shown in the "Note" to Table B. The Company claims, however, that to apply this adjusted rate is in effect to levy a tax upon the entire tax instead of upon that part of the tax which is derived from income from sources within the State of Wisconsin, and that the correct rate will take into account the additional factor of the ratio which the Wisconsin net income bears to the total net income of the Company. The formula which the Company claims is correct for computing the adjusted rate is set forth in the "Note" to Table B.

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Thirteenth: For the reasons above stated F. W. Woolworth Co. claims that because the Privilege Dividend Tax is entirely unconstitutional and void, no tax is due thereunder and that the tax heretofore paid under protest on
123 January 29, 1936 in the amount of $2515.61 was not lawfully due to the State of Wisconsin and the Company, therefore, requests that the assessment hereinabove referred to be vacated and cancelled and that the Tax Commission certify a refund to F. W. Woolworth Co. in the amount of $2515.61 with interest at the rate of 6% per annum from January 31, 1936 to the date upon which the refund shall be paid.

Fourteenth: In the alternative and in the event that it shall be finally determined that the Privilege Dividend Tax Law is unconstitutional and void only as applied to dividends paid to stockholders of foreign corporations residing outside the State of Wisconsin, the Company requests that the assessment hereinabove referred to be reduced to the total of the amounts stated in line 8 of Table B, which is attached hereto and made a part hereof, with lawful interest thereon and that the Tax Commission certify a refund to F. W. Woolworth Co. in the amount of $2515.61 with interest at the rate of 6% per annum from January 31, 1936 to the date upon which the refund shall be paid, minus the amount of such assessment as reduced.

Fifteenth: In the alternative and in the event that it shall be finally determined that the Privilege Dividend Tax Law is entirely valid and

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constitutional, the Company requests that the assessment hereinabove referred to be reduced to the total of the amounts stated in line 10 of
124 Table C, which is attached hereto and made a part hereof, with lawful interest thereon.

Sixteenth: Any statements of claims or objections herein which are inconsistent are intended to be in the alternative and by making such alternative claims and objections the Company does not intend to waive its claim that the Privilege Dividend Tax Law is entirely void and unconstitutional and that no tax is due from the Company, but that on the other hand the Company is entitled to a refund of the entire amount of the tax heretofore paid with interest thereon.

Dated: New York, September 10th, 1937.

F. W. WOOLWORTH CO.
By A. L. Cornwell,
Vice-President.

PAUL COSTELLO,
Notary Public, Queens County
Certificate Filed in
New York County Clerk's No. 26
New York County Register's No. 8-C-17
Kings County Clerk's No. 103
Kings County Register's No. 6018
Commission Expires March 30, 1938

DAVIES, AUERBACH & CORNELL,
One Wall Street,
New York, New York.

GILBERT ELA, HEILMAN & RAEDER,
One West Main Street,
Madison, Wisconsin.
Attorneys for Applicant.

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126 **Table A—Folded insert.**

127-128 **Table B—Folded insert.**

129 **Table C—Folded insert.**

130 **Table D—Folded insert.**

131 **Table E—Folded insert.**

133 **Exhibit 10—Folded insert.**

135 **Exhibit 11—Folded insert.**

136 *ADMISSION OF SERVICE* of Notice of Appeal to Circuit Court by Wisconsin Tax Commission.
(Omitted.)

137-157 *NOTICE OF APPEAL* to Wisconsin Tax Commission.
(Included at C. 22-26.)

158-159 *ANSWER* of Wisconsin Tax Commission.
(Included at C. 27.)

160 *ADMISSION OF SERVICE* of Appellant's Brief by Wisconsin Tax Commission.
(Omitted.)

161-195 *APPELLANT'S BRIEF* in Circuit Court.
(Omitted.)

196-236 *RESPONDENT'S BRIEF* in Circuit Court.
(Omitted.)

237 *STIPULATION* with Respect to Hearing in Circuit Court.
(Omitted.)

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238-239 *DECISION AND ORDER* Confirming Assessment and Confirming Order Denying Claim for Refund and Directing Judgment.

(Caption omitted.)

238 The above entitled matter comes before this Court upon appeal taken by F. W. Woolworth Co., a foreign corporation, from the decision and order of the Wisconsin Tax Commission dated December 19th, 1938.

Briefs were filed by Davies, Auerbach, Cornell & Hardy of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, representing the F. W. Woolworth Co., appellant, and by the Attorney General of the State of Wisconsin and H. H. Persons, Esq., Assistant Attorney General, representing the respondent.

The court has considered the issues and matters raised on this appeal and which are covered in briefs filed by the respective parties, and particularly the constitutional question raised by the appellant; in view of the decision of the Supreme Court of the State of Wisconsin in the case of *State of Wis. ex. rel., Froedert Grain & Malting Co., Inc., vs. Wisconsin Tax Commission*, 221 Wis. 225, and particularly in view of the decision rendered on the motion for rehearing in that case, this Court feels that it has no alternative except to hold the law under which the assessments were levied constitutional; and accordingly the said order of the Wisconsin Tax Commission affirming the assessment or assessments involved in this appeal should be confirmed, and further

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that the order denying taxpayer's claim for refund in respect to taxes paid on account of dividends paid December 2nd, 1935, must also be affirmed. The other issues presented upon the
239 appeal are also decided in favor of the Wisconsin Tax Commission.

IT IS, THEREFRE, ORDERED, that the assessment on this appeal by the Wisconsin Tax Commission against F. W. Woolworth Co., a foreign corporation, be and the same is hereby confirmed, and that judgment confirming said assessment be entered herein, and that further the order of the Wisconsin Tax Commission dated Dec. 19th, 1938, denying the claim of the F. W. Woolworth Co. for refund in respect to taxes paid on account of dividends paid on December 2nd, 1935, be and the same is hereby affirmed and that judgment affirming said order be entered herein.

AUGUST C. HOPPMANN,
Circuit Judge.

Dated, June 10, 1939.

240 *WAIVER* or Notice of Appellant to Application for Entry of Judgment.

(Omitted.)

241-242 JUDGMENT OF CIRCUIT COURT.

(Caption omitted.)

241 At the regular March 1939 term of the Circuit Court, begun and held in the Court House in

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the City of Madison in said county, and on the 10 day of June, 1939 of said term. Present the Hon. August C. Hoppmann, Circuit Judge presiding.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated December 19th, 1938, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the F. W. Woolworth Co., a foreign corporation, being dividends of December 2nd, 1935, March 2nd, 1936, June 1st, 1936, September 1st, 1936, December 1st, 1936 and March 1st, 1937, and which said order further denied the claim of F. W. Woolworth Co. for refund in respect to taxes paid on account of dividends paid December 2nd, 1935; the matter coming on to be heard at said term under the provisions of the Wisconsin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by Davies, Auerbach, Cornell & Hardy of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys, and the respondent appearing by the Attorney General and Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and affirming the order of the Wisconsin Tax Commission denying the claim for refund of F. W. Woolworth Co. on account of tax paid on dividends declared

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242 December 2nd, 1935, and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant, F. W. Woolworth Co., a foreign corporation.

Now, therefore, upon the record, files and proceedings in the above entitled appeal and on motion of the attorneys for the Wisconsin Tax Commission,

IT IS ADJUDGED that said order of the Wisconsin Tax Commission dated December 19th, 1938 and the said assessment and tax imposed thereby and the denial thereof of appellant's claim for refund, be and the same are in all respects confirmed without costs to either party, except that the appellant F. W. Woolworth Co. shall pay the clerk's fee.

By the Court,

AUGUST C. HOPPMANN,
Judge.

243-246 *NOTICE OF APPEAL* to Supreme Court.

(Omitted.)

246 *UNDERTAKING* on Appeal to Supreme Court.

(Omitted.)

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247 *POWER OF ATTORNEY* to Execute Undertaking on Appeal.

(Omitted.)

248 *RETURN* of Circuit Court to Supreme Court on Appeal.

(Omitted.)

Respectfully submitted,

DAVIES, AUERBACH, CORNELL & HARDY,
1 Wall Street, New York.

ELA, CHRISTIANSON & ELA,
Madison, Wisconsin,
Attorneys for Appellant.

Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Eighth day of August, A. D. 1939.

Present: Hon. Marvin B. Rosenberry, Chief Justice, Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. George B. Nelson, Hon. Joseph Martin, Justices. Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the fifteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-nine came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the F. W. Woolworth Company, a foreign corporation, by its attorneys and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Dane County, in said State, in words and figures following, that is to say:

STATE OF WISCONSIN, IN CIRCUIT COURT FOR DANE COUNTY

Notice of Appeal

F. W. WOOLWORTH Co., a foreign corporation, Appellant,

vs

WISCONSIN TAX COMMISSION, Respondent

Circuit Court, Dane County, Wis. Filed Jun 13, 1939. Myrtle L. Hansen, Clerk.

You will please take notice that F. W. Woolworth Co., a foreign corporation, appellant in the above proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this action in the Circuit Court for Dane County, Wisconsin, on the 10th day of June, 1939, in favor of the respondent and against the appellant, which said judgment confirmed an order of the Wisconsin Tax Commission dated December 19th, 1938, and the assessment and tax imposed thereby and denied appellant's claim for refund, and from the whole of said judgment.

A copy of said judgment appealed from is hereto annexed.

Dated, June 12, 1939.

Davies, Auerbach, Cornell & Hardy, & Ela Christianson & Ela, Attorneys for Appellant.

To: John E. Martin, Esq., Atty. General of State of Wisconsin.

Harold H. Persons, Esq., Asst. Atty. General of State of Wis. Clerk of the Circuit Court for Dane County, Wisconsin.

Filed: June 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

State of Wisconsin, in Circuit Court for Dane County

Circuit Court, Dane County, Wis. Filed Jun. 13, 1939. Myrtle L. Hansen, Clerk.

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Judgment

F. W. Woolworth Co., a foreign corporation, Appellant,

vs.

Wisconsin Tax Commission, Respondent

At the regular March 1939 term of the Circuit Court, begun and held in the Court House in the City of Madison in said county, and on the 10 day of June, 1939 of said term. Present the Hon. August C. Hoppmann, Circuit Judge presiding.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated December 19th, 1938, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the F. W. Woolworth Co., a foreign corporation, being dividends of December 2nd, 1935, March 2nd, 1936, June 1st, 1936, September 1st, 1936, December 1st, 1936 and March 1st, 1937, and which said order further denied the claim of F. W. Woolworth Co. for refund in respect to taxes paid on account of dividends paid December 2nd, 1935; the matter coming on to be heard at said term under the provisions of the Wiscon-

sin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by Davies, Auerbach, Cornell & Hardy of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys, and the respondent appearing by the Attorney General and Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and affirming the order of the Wisconsin Tax Commission denying the claim for refund of F. W. Woolworth Co. on account of tax paid on dividends declared December 2nd, 1935 and directing that judgment be entered in accordance therewith, and notice so provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant, F. W. Woolworth Co., a foreign corporation.

Now, therefore, upon the record, files and proceedings in the above entitled appeal and on motion of the attorneys for the Wisconsin Tax Commission,

It is adjudged that said order of the Wisconsin Tax Commission dated December 19th, 1938 and the said assessment and tax imposed thereby and the denial thereof of appellant's claim for refund, be and the same are in all respects confirmed without costs to either party, except that the appellant F. W. Woolworth Co. shall pay the clerk's fee.

By the Court,

August C. Hoppmann, Judge.

Bond No. S-139814

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

State of Wisconsin, in Circuit Court for Dane County

Undertaking on Appeal

F. W. Woolworth Co., a foreign corporation, Appellant,

vs.

Wisconsin Tax Commission, Respondent

Whereas, on the 10th day of June, 1939 in the Circuit Court for Dane County, Wisconsin, a judgment was entered

confirming the order of the Wisconsin Tax Commission dated December 19th, 1938 and the assessment and tax imposed thereby and denying appellant's claim for refund on portion of the tax paid, and the said F. W. Woolworth Co., a foreign corporation, feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin,

Now, therefore, the undersigned Royal Indemnity Company of New York City, New York, a corporation duly licensed to do business in the State of Wisconsin, does hereby, pursuant to statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding Two Hundred Fifty ($250.00) Dollars.

Dated at Madison, Wisconsin, this 12 day of June, A. D. 1939.

Royal Indemnity Company of New York, by Theodore Herfurth, Attorney-in-fact. (Seal.)

In Presence of: Mildred Subey, Katherine LeBarro.

Power of Attorney

(Endorsements)

Original

Service admitted this 13th day of June, 1939. Myrtle L. Hansen, Clerk.

STATE OF WISCONSIN,
Circuit Court, Dane County:

F. W. WOOLWORTH Co., a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

NOTICE OF APPEAL AND UNDERTAKING ON APPEAL

Filed June 15, 1939, Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Circuit Court, Dane County, Wis. Filed Jun. 13, 1939. Myrtle L. Hansen, Clerk.

Ela, Christianson & Ela, 1 West Main Street, Madison, Wis., Attorneys for Appellant.

Due service admitted this 13th day of June, A. D. 1939. John E. Martin, Atty. General of Wis., By H. H. Persons, Asst. Atty. Genl., Attorneys for Respondent.

And afterwards, to-wit: on the 6th day of November, A. D. 1939, the following stipulation was filed in this cause:

IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1939. No. 97

F. W. WOOLWORTH COMPANY, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Appellant-Plaintiff by its attorneys at law, and John E. Martin, Attorney General of the State of Wisconsin and Harold H. Persons, Assistant Attorney General of the State of Wisconsin, as attorneys for the Wisconsin Tax Commission, Respondent, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin, that the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin, may be made parties defendant and respondent in the above-entitled matter and that an order may be made and entered to that effect forthwith and without any further notice to any of the parties.

Dated October 30, 1939.

Davies, Auerbach, Cornell & Hardy, Ela, Christianson & Ela, Attorneys for Appellant-Plaintiff. John E. Martin, Attorney General of the State of Wisconsin. Harold H. Persons, Assistant Attorney General of the State of Wisconsin, Attorneys for Respondent, Wisconsin Tax Commission, and for the State of Wisconsin, and Elmer E. Barlow, Commissioner of Taxation of Wisconsin.

Upon the foregoing Stipulation,

It Is Hereby Ordered: That the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin be and the same hereby are made defendants and respondents in the above-entitled matter.

Dated this 6th day of November, 1939.

By the Court.

Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin.

And afterwards to wit on the 7th day of November, A. D. 1939, the same being the 21st day of said term, the following proceedings were had in said cause in this Court:

Dane Circuit Court

F. W. Woolworth Company, a foreign corporation, Appellant,

vs.

Wisconsin Tax Commission, Respondent

And now at this day came the parties herein, by their attorneys, and this cause having been argued by G. Burgess Ela, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards, to wit: on the 16th day of January, A. D. 1940, the same being the 4th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

Dane Circuit Court

F. W. Woolworth Company, a foreign corporation, Appellant,

vs.

Wisconsin Tax Commission, Respondent

Opinion by Chief Justice Rosenberry

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of

the Circuit Court of Dane County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment setting aside the assessment and allowing the claim for refund made by the plaintiff.

Justice Fowler dissents.

Thereupon the opinion of the Court by Chief Justice Rosenberry was filed in words and figures following, that is to say:

IN SUPREME COURT, STATE OF WISCONSIN, AUGUST TERM, 1939

No. 97

F. W. WOOLWORTH COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Appeal from a judgment of the circuit court for Dane county. August C. Hoppmann, Circuit Judge, presiding. Reversed.

This action was begun on January 11, 1939, by F. W. Woolworth Company, a foreign corporation, plaintiff, against the Wisconsin Tax Commission, defendant, to set aside an assessment of a tax imposed under the provisions of sec. 3, ch. 505, Laws of 1935, as amended, sec. 70.61, Stats. and to recover a refund. From the judgment entered on June 10, 1939, confirming the assessment and denying claim for refund, the plaintiff appeals.

ROSENBERRY, C. J.

The principal question involved in this case is that considered and determined in the case of J. C. Penney Company vs. Wisconsin Tax Commission, decided herewith. For the reasons stated in that case the judgment in this case must be reversed.

By the Court.—The judgment appealed from is reversed and cause remanded with directions to enter judgment setting aside the assessment and allowing the claim for refund made by the plaintiff.

IN SUPREME COURT, STATE OF WISCONSIN

F. W. WOOLWORTH COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause in this Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 29th day of March, A. D. 1940.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.